83-2051

No._____

SUPREME COURT OF THE UNITED STATES

June Term, 1984

Vladimir N. Etlin,

Petitioner

versus

Michell Etlin,

Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA

Vladimir N. Etlin
7403 Lisle Avenue
Falls Church, VA 22043
Tel. No. 703/684-6607
Petitioner, pro se

Michelle Etlin
7519 Spring Lake Dr. B-1
Bethesda, MD 20034
Respondent

QUESTIONS PRESENTED

1. Whether Petitioner's wages were seized in violation of the fundamental principles of procedural due process.

2. Whether Virginia's statute for garnishment procedure is unconstitutional.

PARTIES TO THE PROCEEDING

Petitioner:

Vladimir N. Etlin

Respondent:

Michelle Etlin

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PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA

The Petitioner, Vladimir N. Etlin respectfully prays that a Writ of Certiorari be issued to review the judgment of the Virginia Supreme Court entered on March 15, 1984.

OPINION BELOW

The Supreme Court of Virginia refused Petitioner's petition for appeal on March 15, 1985 because "there is no reversible error in the judgment complaint of".

A copy of the order is attached as Exhibit 1.

JURISDICTION

On February 14, 1983 Petitioner filed a petition for appeal to the Supreme Court of Virginia, where he argued that Virginia's statute for garnishment procedure, § 8.01-511, was unconstitutional, and that Fairfax Circuit Court seized Petitioner's property frivously and without following the fundamental principles of procedural due process.

On March 15, 1984 the Supreme Court of Virginia refused Petitioner's petition for appeal (Exhibit 1). The jurisdiction of this Court is invoked

under several applicable decisions of this Court and the Federal Court of Appeals which are in conflict with the decision of the Virginia Supreme Court.

Constitutional Provision Involved

United States Constitution,

Amendment V:

> No person... shall be deprived of life, liberty or property, without due process of law....

Amendment VIX:

> ...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law; ...

STATEMENT OF THE CASE

1. On May 13, 1981 a judgment of $2,023.45 was rendered in the Circuit Court of the County of Fairfax in favor of Michelle Etlin, Respondent, against Vladimir Etlin, Petitioner for the errears in his child support payments. Petitioner appealed that judgment on the grounds that

the amount of child support awarded was exhorbitant and Petitioner could not fully comply with the court order and that Respondent committed perjury by presenting fraudulent evidence to the court as far as her income and the parties son's needs are concerned. On June 3, 1982, Fairfax Court finally changed Petitioner's child support obligations reducing them by 50% but did not adjust the amount of his arrears.

2. On July 20, 1982 the garnishment summons was issued to the County of Arlington to collect the judgment from the County's employee, Vladimir Etlin, without any court hearing on what reasonable amount should be taken from each pay check without jeopardizing Petitioner's and his son's essential needs.

3. On August 16, 1982, after learning that his pay check was seized, Petitioner filed his Motion in the Fairfax Court to dissolve the writ to garnish on the grounds that Petitioner's fundamental rights for a procedural due process were violated. That Motion was denied without a hearing.

4. Under the garnishment summons the Garnishee, the County of Arlington, had to come to the Fairfax Court on October 2, 1982 to submit garnished money to the court.

   On October 2, 1982, Petitioner again moved the Fairfax Court to release the garnished money back to him on the grounds that:

   a. There was no one at the hearing to claim the garnished money, hence no one's interest to be protected. Neither the creditor, Michelle Etlin nor her lawyer appeared because she

had kidnapped Petitioner's son, concealed her own whereabouts, and there was a warrant out for her arrest.

b. The creditor's petition for the Writ of Granishment was frivolous in order to harass Petitioner and with no intention to appear before the Fairfax Court to argue the case and to claim the garnished money.

c. The Writ of Garnishment was improperly issued and improperly served. There was no pregarnishment court hearing to determine what part of the Petitioner's pay check should be withheld without causing undue hardship upon Petitioner. The amount of money garnished from the Petitioner was determined arbitrarily by the Petitioner's employer and not be a judge and the amount left to Petitioner was not sufficient to support his and his

son's essential needs.

That hearing was delayed for 4 weeks and held on October 29, 1982.

During that hearing there was no one to rebute Petitioner's testimony or to claim money and yet Petitioner's motion was denied in November 1983 and money was sent to the Respondent's ex lawyer who made statements in the past that he has no knowledge about whereabouts of his fugitive ex-client.

On February 14, 1983 Petitioner filed a petition for appeal to the Supreme Court of Virginia where he argued that his pay checks were seized frivolously, and in violation of the fundamental principles of procedural due process and that Virginia's statute for garnishment procedures, § 8.01-511, was unconstitutional.

On March 15, 1984 the Supreme Court of Virginia refused Petitioner's petition for appeal (Exhibit 1).

REASON FOR GRANTING THE WRIT

This Writ is warranted because denial of the Petitioner's appeal by the Virginia Supreme Court is in conflict:

1. With this Court's decisions in a number of cases;
2. With the recent decision of a Federal District Court for West District of Virginia.
3. With a State Court of Last Resort for West Virginia;

and for the following specific reasons:

a. To obtain the Writ of garnishment; and

b. To seize the Petitioner's wages

Respondent through the Court of Fairfax County employed the procedure which violated the Petitioner's constitutional right to due process of law.

This Court has developed for application by the states a set of standards or criteria from which a state must devise, in State-authorized seizures of

property, an acceptable mix of protections for debtor, creditor and State. The standards set out by this Court are as follows:

a. Requirement for judicial Control and Supervision;

b. Requirement for Notice to Debtor;

c. Requirement for Preseizure Hearing;

d. Requirement for Prompt Postseizure Hearing when seizure without hearing is warranted;

e. Requirement for Protection of Interests of Debtor and Creditor.

This Court, by the language with which it develops and applies these standards, has made abundantly clear that the acceptable mix of protections must be developed not for <u>certain</u> types of State-authorized seizures of property, but for <u>any</u> seizure of property authorized by the State. The principles this Court has enunciated in this regard appear

with no qualifying words or phrases, and thus clearly must be applied to the State-authorized seizure of property protested in this appeal.

The standards enunciated by this Court are set out in four notable decisions relied upon hereby Petitioner namely, Mitchell v. W.T. Grant Co., 416 U.S. 600, 94 S.Ct. 1895; Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983; North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 95 S.Ct. 719, and Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 335, 89 S.Ct. 1820.

The procedure employed by Respondent to obtain her writs of garnishment, as permitted by Virginia Code § 8.01-511 clearly fails to meet the requirements set forth by this Court in these four decisions:

a. Absence of, and absence of requirement for, judicial supervision and control.

In the seizures effected in the case at bar, there was no, and no requirement for, judicial determination, supervision, or control.

Virginia's statute allows a clerk of a court, not a judge to issue a writ for garnishment and the garnishee not the judge determines arbitrarily the amount to be seized from the debtor's pay check. The statute, far from requiring that there be, prior to "even tentative action" to seize property, some type of impartial examination of "the support for the plaintiff's position," Fuentes, supra, at 83, 92 S.Ct. at 1995, does not "even require the official issuing the writ...to do that much," id., the result being an absence of effective State control over State power. Id.

b. Absence of, and absence of requirement for, notice to debtor, prior seizure is commenced.

In the seizure effected by the current writ of garnishment as in all

prior seizures, there was no, and no requirement in the Virginia Code notice to debtor before seizure starts. Under Virginia Code § 8.01-511 "The summons shall be served on the garnishee, and shall be served on the judgment debtor..." which means that the debtor at best gets his notice at the same time as garnishee so there is no time to stop the garnishment. In the case at hand Petitioner was served with the notice after his paycheck was seized and after he made inquiry to the garnishee. Prior notice would not have hampered recovery as Petitioner had been with the garnishee, Arlington County, for 6 years and it has been his only source of income.

Given the absence in the Virginia Code of requirement (in the case of domestic-relations "support" garnishments) for either postseizure or preseizure hearing, then the additional absence of any statutory requirement

for notice to the debtor effectively extinguishes the sole opportunity for that debtor to challange the seizure before it takes effect; however, this Court has stated clearly and unequivocally that "if the right to notice and a hearing to serve its full purpose, then, it is clear that it must be granted at a time when deprivation can still be prevented." Fuentes, supra, at 81, 92 S.Ct. at 1994.

c. Absence of, and absence of requirement for, preseizure hearing.

In the seizure effected by the current writ of garnishment as in all prior seizures by Respondent, there was no, and no requirement for, any type of preseizure hearing.

In the one case of the four here cited in which this Court approved the seizure, namely in Mitchell, a preseizure hearing was required by law, and was in fact accomplished. Mitchell,

supra, at 616, 94 S.Ct. at 1904.

This Court emphasized in Sniadach, supra, and later in Fuentes and North Georgia Finishing, Inc., supra,

> ...prejudgment garnishment procedure with obvious taking of property without notice and prior hearing, violates the fundamental principles of precedural due process.

d. Absence of, and absence of any requirement for, prompt postseizure hearing when seizure without hearing is warranted.

In the seizure effected by the current writ of garnishment as in all prior seizures by Respondent, there was no, and no requirement (statutory or otherwise) for, prompt postseizure hearing.

This Court approved the seizure in Mitchell, supra, in part because of the brevity of the pendente lite deprivation there of the debtor's property, which deprivation at least left "his basic source of income...unimpaired." Mitchell supra, at 610, 94 S.Ct. at 1901.

The deprivations imposed by Respondent

here have been neither brief nor pendente lite. Like the Pennsylvania law found defective in Fuentes, supra, the Virginia Code, in the case of the domestic-relations "support" debtor, "does not require that there ever be an opportunity for hearing on the merits." Fuentes, supra, at 77, 92 S.Ct. at 1992. (Emphasis in original.)

Since the property seized by the Respondent here is indeed a substantial portion, as defined solely by the Garnishee, of Petitioner's "basic source of income," Mitchell, supra, at 610, 94 S.Ct. at 1901, the very seizure itself prevents Petitioner's obtaining assistance of retained counsel to defend against the seizure, an additional due-process obstacle not addressed by this Court in Sniadach v. Family Finance Corporation of Bay View, supra, but quite similar, in its effect, to the defendant's-bond requirement then in effect in Georgia, disapprove by this Court in North Georgia Finishing, Inc. v. Di-Chem, Inc., supra,

at 607, 95 S.Ct. at 723; then in effect in Pennsylvania, disapproved by this Court in Fuentes v. Shevin, supra, at 84-86, 92 S.Ct. at 1996-97, and then optional in Wisconsin, disapproved by this Court in Sniadach, supra, at 307, 89 S.Ct. at 1925: in short, another State-imposed financial obstacle to the debtor's obtaining due process of law.

Here the creditor, obtaining a result similar to that obtained in the seizure disapproved by this Court in Sniadach, can, in amount set solely by the Garnishee, seize up to "65 per cent of the disposable earnings...," Virginia Code § 34-29 (in Wisconsin in 1969, "the garnishee shall pay over to the principal defendant...a subsistence allowance...in no event in excess of 50 per cent of the wages...owing," Sniadach, supra at 338, n. 1, 89 S.Ct. at 1821). The result here, as in Sniadach, is not only to "as a practical matter drive a wage-earning family to the wall," id. at 341-42, 89 S.Ct.

at 1822-23, but to make defense even after seizure (absent preseizure hearing or notice, the only defense possible) financially impossible via retained counsel, or interminally delayed, as here, if pro se.

e. Requirement for protection of Interests of Debtor and Creditor

In the seizure effected in the case at bar, the requirement for protection of the interests of the debtor is substantially inadequate and constitutionally infirm, producing a fundamentally unfair and unjust result. Without requirement for notice and judicially-conducted preseizure hearing, and without requirement for judicial supervision and control, the garnishment procedure attacked here caused undue hardship upon Petitioner. The amount of money was determined arbitrarily by the Garnishee not, by the Court, and did not leave to Petitioner a sufficient sum

to support his essential needs, It was held by the West Virginia Supreme Court of Appeals:

> After the garnishment deduction from a person's wages enough money should remain to meet ordinary and necessary expenses, Cotrell v. Public Fin. Corp., 256 S.E. 2d 575 (W. Va. 1979)

and a federal court emphasized the importance of a prior hearing:

> Prejudgment garnishment without the benefit of prior notice or opportunity to be heard to evaluate probable validity of the claim and amount to be garnished constitutes a denial of the debtor's right to due process of law. Union Berge v. Marble Cliff 374 F. Supp. 834 (S.D. W.Va.).

This Court in Sniadach, supra, rejected the Wisconsin statute which is identical to the Virginia statute § 8.01-511, and allowed seizure of a debtor's wages without proper due process of law.

The most objectionable in the case at bar is a purposeless, frivolous violation of the Petitioner's rights to due process by the Fairfax Court. After garnishment of the Petitioner's wages was completed he argued in the lower court that the collected money should be returned back to the Petitioner because, in addition to violation of due process of law, the Fairfax Court was not protecting anyone's rights: neither the creditor nor its representative was present in the court to accept money. Moreover, the creditor had kidnapped the Petitioner's son and there was a warrant for her arrest and yet the judge refused to release money back to the Petitioner and later released it to the creditor's ex-lawyer who did not have any knowledge about the creditor's whereabouts.

In Harris v. Bailey, 675 F.2d 614, the Court of Appeals for the 4th District agreed with the plaintiff that Virginia's garnishment statute is unconstitutional and remanded for an opinion to the district court. District Court for Western District of Virginia held that:

> Virginia's post-judgement garnishment scheme fails to meet due process requirements, id. at 970.

and further elaborating about the deficiencies:

> the statute provides no requirement that this notice be served on the debtor in a timely manner..., id. at 970.
>
> ...the debtor should be informed simply that other possible exemptions from garnishment exists under the law...,id. at 971.
>
> ...as well as the process for contesting the garnishment. Id. at 971.
>
> ...due process mandates a hearing within a meaningful time. The Virginia statutory garnishment scheme provides no mandated expeditious hearing. Id. at 971.

In the case at hand, Petitioner was deprived

wilfully, without due process, of his only source of income. After paying his home and car mortgages, child support and utility bills, garnishment withholdings left to Petitioner only $90.00 a month. To cover his and his son's necessities of life, Petitioner was forced to rely on his relatives help.

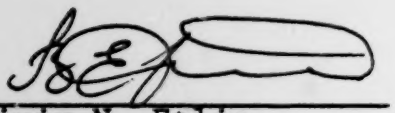
Despite the federal court ruling on unconstitutionality of the Virginia statute, Virginia Supreme Court, four months later, finds no reversible errors either in the statute or in the procedure applied by the Fairfax court to seizure Petitioner's wages.

Conclusion

For the foregoing reasons, Petitioner respectfully requests that a Writ of Certiorari be issued to review the judgement of the Supreme Court of Virginia and to invalidate the post-judgment garnish-

ment procedures permitted by the Virginia court.

Respectfully submitted,



Vladimir N. Etlin
Petitioner, pro se
7403 Lisle Avenue
Falls Church, Va. 22043

Dated:

June __, 1984

Exhibit I

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 15th day of March, 1984.

Vladimir N. Etlin, Appellant,

against Record No. 830243
Circuit Court No. L-57550

Michelle M. Etlin, Appellee.

From the Circuit Court of Fairfax County

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal. Code § 8.01-675.

A copy,

Teste:

Allen L. Lucy, Clerk

By: s/

Deputy Clerk